Supreme Court, U.S.
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No. 97-424

In The
Supreme Court Of The United States
October Term, 1997

SUPERIOR COURT, JUDICIAL DISTRICT
OF HARTFORD / NEW BRITAIN AT HARTFORD,
Petitioner,

v.

KARIN APARO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION
(WITH ATTACHED APPENDIX)

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QUESTION PRESENTED

The Petitioner Failed To Raise A Substantial Federal Claim Worthy Of This Court's Review Because It Was Not Presented Below And The Lower Federal Courts Properly Applied The Principle Of Collateral Estoppel To The Case At Bar In Accordance With Established Law.

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING
THE WRIT 8

CONCLUSION 28

APPENDIX 1A

TABLE OF AUTHORITIES

Cases:

Aparo v. Superior Court,
956 F. Supp. 118 (D. Conn. 1996) . . . . . passim

Ashe v. Swenson,
397 U.S. 446 (1970) . . . . . passim

Blockburger v. United States,
284 U.S. 299 (1932) 15

Commonwealth v. Harris,
582 A.2d 1319 (Pa. Super. 1990) 20

Connecticut v. Aparo,
507 U.S. 972 (1993) 4, 8

Dunn v. United States,
284 U.S. 390 (1932) 21

Green v. United States,
426 F.2d 661 (D.C. Cir. 1970)(per curiam) 20

Illinois v. Gates,
462 U.S. 213 (1983) 10, 11

McGoldrick v. Compagnie Generale Transatlantique,
309 U.S. 430, 434-5 (1940) 10

Ohio v. Johnson,
467 U.S. 493 (1984) 18, 19

Price v. Georgia,
398 U.S. 323 (1970) 15

State v. Aparo,
223 Conn. 384, 614 A.2d 401 (1992) . . . . . passim

State v. Grullon,
212 Conn. 195, 562 A.2d 481 (1989) 27

State v. Johns,
184 Conn. 369, 439 A.2d 1049 (1981) 27

United States v. Citron,
853 F.2d 1055 (2d Cir. 1988) 20

United States v. Davis,
369 F.2d 775 (4th Cir. 1966) 20

United States v. Felix,
503 U.S. 378 (1992) 15

United States v. Flowers,
255 F. Supp. 485 (E.D.N.C. 1966) 20

United States v. Frazier,
880 F.2d 878 (6th Cir. 1989), *cert. denied*
sub nom. DeBusk v. United States,
493 U.S. 1083 (1990) 6, 20

United States v. Gornto,
792 F.2d 1028 (11th Cir. 1986) 20

United States v. Hans,
548 F. Supp. 1119 (S.D. Ohio 1982) 20

United States v. Kenny,
236 F.2d 128 (3rd Cir. 1956) 20

United States v. Mespoulede,
597 F.2d 329 (2d Cir. 1979) . . . . . passim

United States v. Powell,
469 U.S. 57 (1984) 20

United States Constitution:

Fifth Amendment . . . . . passim

Connecticut General Statutes:
§ 53a-8 4
§ 53a-48(a) 4
§ 53a-54a(a) 4

CITATIONS TO OPINION AND ORDER BELOW

The Summary Order of the Court of Appeals for the Second Circuit is reproduced in the Petitioner's Appendix at A-1. The opinion of the District Court is reported at 956 F. Supp. 118 (D. Conn. 1996) and reproduced in the Petitioner's Appendix at A-4 - A-27. The opinion of the Connecticut Supreme Court is reported at 223 Conn. 384, 614 A.2d 401 (1992) and is reprinted in Petitioner's Appendix at A26 - A-55.

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals for the Second Circuit was entered on June 18, 1997. *See* Pet. App. A-1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Connecticut General Statutes Section 53a-8:

§ 53a-8. Criminal liability for acts of another

A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

Connecticut General Statutes Section 53a-48(a):

§ 53a-48. Conspiracy.

(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

Connecticut General Statutes Section 53a-54a(a):

§ 53a-54a. Murder defined...Classification

(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person...

RESPONDENT'S STATEMENT OF THE CASE

I. Introduction

The Respondent, Karin Aparo, respectfully requests that this Court deny the Petitioner's request for a writ of certiorari seeking review of the judgment of the Second Circuit Court of Appeals in *Aparo v. Superior Court*, Summary Order, No. 96-2591, which affirmed the district court's order granting the Petition for Writ of Habeas Corpus. *See Aparo v. Superior Court*, 956 F. Supp. 118 (D. Conn. 1996) (*see* Petitioner's Appendix, A-1 - A-27, hereinafter "Pet. App. ___").

It should be noted that the **same** issues identified in the instant Petition were first raised by the State of Connecticut in its Petition For Writ of Certiorari to the Supreme Court of Connecticut filed in December 1992.[1] *See Connecticut*

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[1] The Petitioner has identified the following two reasons for granting the instant Petition:

A. This Court Has Not Decided Whether Collateral Estoppel May Be Applied To Bar The Retrial Of A Mistried Count After The First Trial Ended In Acquittal On One Count And Deadlock On Another, Where Jeopardy Has Not Terminated On The Mistried Count.

B. If Collateral Estoppel Applies In The Acquittal-Deadlock-Retrial Scenario, It Is Limited To Preclusion Of Evidence Establishing The Ultimate Issue Essential To The Acquitted Count.

See Petition For Writ Of Certiorari, 97-424.

v Aparo, Petition For Writ of Certiorari, No. 92-1067 (October Term, 1992). This Court denied the petition and declined to review these issues on March 8, 1993. *See Connecticut v. Aparo*, 507 U.S. 972 (1993).

I. Nature of the Proceedings

The Respondent, Karin Aparo, who was sixteen at the time of her arrest in 1987, was charged with one count of murder as an accessory in violation of Connecticut General Statutes §§ 53a-54a(a) and 53a-8, and one count of conspiracy to commit murder in violation of Connecticut General Statutes §§ 53a-48(a) and 53a-54a(a). *Aparo v. Superior Court*, 956 F. Supp. 119 (D. Conn. 1996) (Pet. App. A-4 - A-5). A jury of twelve acquitted her of the accessory charge but could not reach a verdict on the

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In 1992, the Petitioner raised the same issues:

A. The Connecticut Supreme Court Erred In Holding That The Principle Of Collateral Estoppel Applies To Cases Of Continuing Jeopardy, Where The Jury, On A Multicount Information, Acquits The Defendant On One Count And Fails To Reach A Verdict On The Other Count, And The State Intends To Retry The Defendant On The Mistried Count.

B. If Collateral Estoppel Applies In Cases Of Continuing Jeopardy, It Precludes Only Relitigation Of Ultimate Issues And Does Not Operate To Bar The Reuse Of Evidentiary Facts.

See Connecticut v. Aparo, Petition For Writ of Certiorari, No. 92-1067 (October Term, 1992), *cert. denied*, *Connecticut v. Aparo*, 507 U.S. 972 (1993).

conspiracy charge.[2] After the trial court declared a mistrial on the conspiracy count, the state announced its intention to retry the Respondent on that count. *Id.*, 956 F. Supp. at 119 (Pet. App. at A-5).

The Respondent filed a motion to dismiss all pending charges in the state trial court. Upon the trial court's denial of this motion, the Respondent took an interlocutory appeal to the Connecticut Supreme Court in which she raised, *inter alia*, the following issues: (1) collateral estoppel precluded a retrial because the jury necessarily found that she never intended that her mother be killed; (2) collateral estoppel precluded a retrial because the jury necessarily found that she never agreed with Coleman to commit murder; and (3) collateral estoppel required the exclusion of certain evidence, leaving insufficient admissible evidence to warrant a retrial. *State v. Aparo*, 223 Conn. 384, 401-11, 614 A.2d 401 (1992) (Pet. App. A-45 - A-55).

The Connecticut Supreme Court rejected the first and second of these claims, but it accepted the third claim in part. *Id.*, at 387, 406-11 (Pet. App. at A-31, A-50 - A-55). In its decision, the court discussed at length whether the principle of collateral estoppel, as enunciated in *Ashe v. Swenson*, 397 U.S. 436 (1970), applied when a jury acquits on one count of a multicount indictment and does not reach a verdict on another count. *See Aparo*, 223 Conn. at 391 (Pet. App. at A-35). Relying upon decisions from the

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[2] The vote on the mistried count was seven to five for acquittal. *State v. Aparo*, 223 Conn. at 387 (Pet. App. A-31).

federal circuit courts,[3] the court concluded that collateral estoppel bars the state from relitigating a question of ultimate fact that was determined in the Respondent's favor by a partial verdict. *Id.*, at 388-93 (Pet. App. at A-32 - A-37). In reaching its conclusion, the Connecticut Supreme Court quoted from *United States v. Mespoulede*, 587 F.2d 329, 336-7 (2d Cir. 1979):

> We tolerate inconsistencies in unified jury verdicts in criminal cases, not because of any singular virtue we attribute to inconsistency, but rather out of deference to the nature of the jury and the role it plays in our jurisprudence. There is no question but that a jury in a criminal trial has the power to render a verdict of acquittal that is wholly at odds with the law and the facts. . . . We recognize that the jury is in a sense the conscience of the community and can, for example, render a verdict to mitigate an overly severe punishment. . . . Similarly, in compromising in order to reach a unanimous verdict, a jury is often fulfilling its role as a cross-section of the community that it supposed to represent. Occasional anomalies are the price of unanimity. . . .
>
> Internal inconsistency, then, is not an end in itself, and it would be irrational to expand gratuitously the judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach

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[3] The Court was persuaded by the reasoning in *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979) (citing cases); and, *United States v. Frazier*, 880 F.2d 878 (6th Cir. 1989, *cert. denied sub nom. DeBusk v. United States*, 493 U.S. 1083 (1990).

> contradictory results. Allowing a second jury to reconsider the very issue upon which the defendant has prevailed . . . implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the same ordeal of multiple trials, that lie at the heart of the double jeopardy clause.

State v. Aparo, 223 Conn. at 392 (Pet. App. at A-36).

The Connecticut Supreme Court reached the merits of the Respondent's claims and affirmed the trial court's decision that collateral estoppel did not act as a complete bar to retrial. *Aparo*, 223 Conn. at 387-8, 401-4 (Pet. App. at A-31 - A-32, A-45 - A-48). However, the Connecticut Supreme Court reversed the trial court's decision that no evidence should be excluded at a retrial and held that "evidence of crimes of which the defendant has previously been acquitted, and concerning which the prior jury demonstrably harbored a reasonable doubt, should be excluded when it would establish an element of the charged offense and could therefore form the basis of the conviction." *Id.* at 409 (citations omitted) (Pet. App. at A-53).

The court further noted that "the prior acquittal indicates that the jury necessarily rejected some evidence that, if believed, could establish essential elements of conspiracy, specifically agreement, intent to agree, and intent to kill." *Id.* In particular, the court determined that the state may not introduce Coleman's testimony that the respondent requested, on the night before the murder took place, that Coleman kill her mother. *Id.*, at 410 (Pet. App. at A-54).

In December of 1992, following the decision of the Connecticut Supreme Court, the State of Connecticut filed a Petition for Writ of Certiorari to this Court in which it challenged the Connecticut Supreme Court's decision on two grounds: (1) that it was error to apply collateral estoppel to a case of continuing jeopardy;[4] and, (2) that it was error to preclude the reuse of evidentiary facts. *See Connecticut v. Aparo*, Petition For Writ of Certiorari, No. 92-1067 (October Term, 1992). The Petition was denied on March 8, 1993. *Connecticut v. Aparo*, 507 U.S. 972 (1993). Thus, this Court declined to review the same issues raised in the instant petition in 1992.

On March 18, 1993, the Respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of Connecticut, claiming that the principle of collateral estoppel barred her retrial on the conspiracy to commit murder charge since the jury in the first trial, by its acquittal on the murder charge, necessarily determined an essential element of the crime of conspiracy to commit murder in her favor. *Aparo v. Superior Court*, 956 F. Supp. 118, 119 (D. Conn. 1996) (Pet. App. A-6).

On June 24, 1996, the district court issued a lengthy ruling in which it granted the Petition and ordered the case remanded to the Hartford Superior Court with direction to dismiss the conspiracy count. The district court held that the jury, in acquitting the Respondent of being an accessory in her mother's murder, necessarily found that she lacked the intent to murder, an element common to both the

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[4] The Petitioner did not raise this claim on appeal to the Connecticut Supreme Court.

accessory charge and the conspiracy charge. *Id.*, at 122-26 (Pet. App. A-11 - A-22). The district court also found that the trial court's jury charge had collapsed the conspiracy count into the accessory count, so that in acquitting the Respondent of being an accessory to the murder of her mother, the jury necessarily found that she did not intend to agree with Coleman to kill her mother. *Id.*, at 126-28 (Pet. App. A-22 - A-26).

The Petitioner filed an appeal to the Court of Appeals for the Second Circuit, which issued a summary order affirming the district court's granting of the petition for writ of habeas corpus. *See* Pet. App. at A-1 - A-2.

II. Statement Of Facts

The Respondent incorporates herein the district court's discussion of the facts, *see Aparo v. Superior Court*, 956 F. Supp. 118, 122-27 (D. Conn. 1996) (Pet. App. A-11 - A-22).

REASONS FOR DENYING THE WRIT

I. The Petitioner Does Not Raise A Substantial Federal Claim Worthy Of This Court's Review Because It Was Not Presented Below And The Lower Courts Properly Applied The Principle Of Collateral Estoppel To The Case At Bar In Accordance With Established Law.

A. The Petitioner Is Precluded From Challenging The Lower Courts' Application Of The Principle Of Collateral Estoppel To The Case At Bar Since The Petitioner Failed To Press This Issue Below.

The Petitioner never properly raised the issue of whether the principle of collateral estoppel is applicable in a situation where the jury had acquitted on one charge and failed to reach a verdict on another charge either in the district court or before the Court of Appeals for the Second Circuit. "[I]t is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *Illinois v. Gates*, 462 U.S. 213, 218 (1983) (quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-5 (1940)).

The Petitioner's failure to press the issues articulated in the present Petition in the district court is evident by the fact that the district court's opinion did not discuss whether collateral estoppel applies to the acquittal-mistrial-retrial situation. Rather, the Petitioner raised other procedural

arguments in support of its argument that the habeas corpus petition should be denied, namely, that the exhaustion doctrine as well as the cause and prejudice standard required dismissal. Both procedural issues raised by the Petitioner were addressed by the district court in its opinion. *See Aparo v. Superior Court*, 956 F. Supp. 118, 120-21 (D. Conn. 1996) (Pet. App. A-6 - A-8). Likewise, the issues presented in this Petition were never properly briefed or articulated to the Court of Appeals, and therefore, the Respondent is not entitled to raise the issues now. *See Gates*, 462 U.S. at 217-24 (no reason to treat the state's failure to have challenged an asserted federal claim differently from the failure of the proponent of federal claim to have raised that claim). Accordingly, since the issues presented in the instant matter were not properly presented in the lower courts, the Petition must be denied.

B. Since The Jury's Verdict Of Acquittal On The Murder Count Represents A Valid And Final Judgment, The Court Of Appeals For The Second Circuit Properly Affirmed The District Court's Application Of The Principle Of Collateral Estoppel To The Case At Bar In Accordance With Established Law.

The Petitioner's argument that collateral estoppel is inapplicable to a mistried count at a retrial is inapposite to *Ashe v. Swenson*, 397 U.S. 436 (1970), in which this Court held that whenever an issue of ultimate fact has once been determined by a *valid and final judgment*, that issue cannot be litigated between the same parties in any future lawsuit. 397 U.S. at 443. In this case, the principle of collateral estoppel was properly applied to the case at bar since the

jury's verdict of acquittal on the accessory to murder count represented "a valid and final judgment."

In *Ashe v. Swenson*, this Court defined collateral estoppel as follows:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.
>
> ... the rule of collateral estoppel is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

Ashe v. Swenson, 397 U.S. at 443-4.

Since the determination of whether collateral estoppel is applicable is based upon the **final judgment of acquittal**, i.e., whether an issue of ultimate fact was determined by the verdict of not guilty, it would make no sense to apply it to a successive prosecution case, but not to a mistried count at a retrial. The primary purpose of the doctrine of collateral estoppel is to protect an accused from the unfairness of being required to relitigate an issue which has been once determined in his favor by a verdict of acquittal. *See Ashe*, 397 U.S. at 446 (it "protects a man who has been acquitted from having to 'run the gauntlet' a second time"). The Court of Appeals for the Second Circuit in *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979), noted that "... once a defendant has satisfied one jury that he is not guilty of a crime, constitutionally-rooted considerations of fairness preclude the Government from injecting any issues necessarily decided in his favor into a second trial for another offense." *Mespoulede*, 597 F.2d at 330.

In *Mespoulede*, the Second Circuit held that collateral estoppel bars the Government from relitigating a question of fact that was determined in the defendant's favor by a partial verdict. *Id.*, at 336-7. In that case, the defendant was charged in a two count indictment with conspiracy to distribute cocaine and with possessing cocaine with the intent to distribute. *Id.*, at 330. The jury acquitted the defendant on the possession count, but it failed to reach a verdict on the conspiracy count. *Id.*, at 332. At retrial on the conspiracy count, the trial court denied the defendant's motion to bar the Government from introducing evidence that he possessed cocaine.

The Second Circuit reversed, stating that since evidence of possession was introduced to persuade the second jury of the same fact already litigated and resolved in the defendant's favor, it would be "inequitable" to refuse the assertion of collateral estoppel. *Id.*, at 335. The court further noted:

> Allowing a second jury to reconsider the very issue upon which the defendant has prevailed serves no valuable function. To the contrary, it implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause.

Id., at 336-7.

Therefore, because the jury's verdict of acquittal on the murder count was a valid and final judgment, the Court Of Appeals For The Second Circuit's affirmance of the District Court's application of collateral estoppel to the mistried conspiracy count was in accord with the established principles of law as articulated by this Court in *Ashe v. Swenson*, 397 U.S. 446 (1970). Accordingly, the Petition should be denied.

The Petitioner argued that the continuing jeopardy principle should preclude application of collateral estoppel in the acquittal-deadlock-retrial scenario because "[d]ouble jeopardy protection is implicated only where there has been some event, such as an acquittal or conviction, which terminates the original jeopardy." *See* Petition at 20. The Petitioner's argument is misplaced because it ignores the fact that there was an acquittal in this case. The Petitioner

also fails to recognize that the protection afforded a defendant by the collateral estoppel principles in *Ashe v. Swenson* is separate and distinct from that accorded by the traditional double jeopardy line of cases (i.e., *Blockburger v. United States*, 284 U.S. 299 (1932), *United States v. Felix*, 503 U.S. 378 (1992)) and that the collateral estoppel analysis, which focuses upon a valid and final judgment of acquittal, is different from the traditional double jeopardy analysis.

The Petitioner's reliance upon this Court's decision in *Price v. Georgia*, 398 U.S. 323 (1970), to support its argument that collateral estoppel is inapplicable in the acquittal-deadlock-retrial scenario is misplaced. *See* Petitioner's Petition at 19, n.6. In *Price*, the jury had acquitted the defendant of murder and convicted him of the lesser included offense of voluntary manslaughter. 398 U.S. at 324. After the conviction was reversed on appeal, the defendant was again placed on trial under the original murder charge. The second jury also convicted him of voluntary manslaughter. This Court held that because the defendant sought and obtained the reversal of his initial conviction by taking an appeal, double jeopardy did not prevent a retrial for that crime. *Id.*, at 326-7. However, this Court also held that double jeopardy required that the retrial be limited to that lesser offense, and therefore, reversed his conviction. *Id.*, at 327-32.

There is no analogy between *Price* and the case at hand. In *Price*, the defendant was acquitted of murder and convicted on the lesser included offense of voluntary manslaughter. By appealing his conviction, he waived any claim of double jeopardy on a retrial for that offense. In the instant matter, the Respondent has not waived her

constitutional claim against being required to relitigate an issue which has been once determined in her favor by a verdict of acquittal. The jury acquitted her on the charge of murder and could not reach a verdict on the charge of conspiracy to commit murder. It is the Respondent's position that based upon the acquittal on the murder charge, the jury necessarily found in her favor on an element that the petitioner will have to prove at the retrial. Therefore, the Respondent will be litigating a second time at least one ultimate issue that has previously been decided in her favor. Accordingly, there is nothing to be gained by comparing the case at hand with this Court's decision in *Price v. Georgia*.

The Petitioner also argued that the Respondent should not be allowed to assert collateral estoppel on retrial because "the second trial is necessitated by jury deadlock, a neutral occurrence, and not by prosecutorial abuse or manipulation." *See* Petition, at 23-4. However, the Respondent does not agree that the second trial is the result of a neutral occurrence; rather the Respondent submits that the jury deadlock was caused by aberrant judicial procedure. Specifically, when all the circumstances of the proceedings below are examined, it is clear that the jury was unable to reach a verdict on the conspiracy count[5] due

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[5] The conspiracy count is unique in that the petitioner charged the crime of conspiracy in two subsections with the time frame being the only difference between them. Subsection (a) alleged a conspiracy that began in the summer of 1986 when the respondent was fifteen years old and ended on August 5, 1987 when the she was sixteen while subsection (b) alleged the same time frame as alleged in the substantive murder count; that is, a conspiracy for an approximately two-week time period directly prior to the murder

to the confusing instructions it received from the trial court. The court initially noted the following:

> I've just given you one instruction on the two parts of the count of conspiracy. However, it applies to both parts, so you must consider both each part separately and make a finding as to each part separately.
>
> .....
>
> As to the second count, each part will be read separately, so the clerk will read part (a), and then ask how did the jury find the defendant, guilty or not guilty . . . and then the second part will be read, and, likewise, the foreperson will be asked.

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when the respondent was sixteen years old. The conspiracy count charged two subcounts as follows:

> a) at or near the town of Glastonbury, Connecticut on divers dates between August 1986 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY; and
>
> b) at or near the town of Glastonbury, Connecticut on divers dates between July 14, 1987 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY.

See Respondent's Appendix 2A.

See Respondent's Appendix at 3A.

However, after eight days of deliberations, the trial court reinstructed the jury on the conspiracy count. On the day before the jury announced that it was deadlocked on the conspiracy count, the jury requested "to rehear [the court's] instructions regarding the distinction between count two conspiracy charges (a) and (b)." *See* Respondent's Appendix 4A. The court responded by charging: "the distinction is only one of semantics, because if you were to find the elements of either (a) or (b), you would necessarily find all of the elements of the other." *See* Respondent's Appendix 4A.

This instruction, in conjunction with the earlier instruction, was ambiguous and confusing and accounts for the jury's inability to reach a verdict on that count. Therefore, the Petitioner's argument that the second trial was the result of a neutral occurrence is without merit.

The Petitioner also argued that collateral estoppel should not apply where the state tried both counts simultaneously and pointed to dicta from this Court's decision in *Ohio v. Johnson*, 467 U.S. 493 (1984). *See* Petitioner's Petition at 24. However, the instant case is distinguishable from *Ohio v. Johnson*.

In *Johnson*, the defendant was charged with murder, involuntary manslaughter, grand theft and aggravated robbery. After the defendant pled guilty to the lesser offenses of involuntary manslaughter and grand theft, the trial court dismissed the remaining counts on the ground that further prosecution was barred by double jeopardy. *Johnson*, 467 U.S. at 494. The United States Supreme

Court reversed and held that prosecuting the defendant on the two remaining charges would not constitute the type of "multiple prosecution" prohibited by the double jeopardy clause because he "has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the State had the opportunity to marshall its evidence and resources more than once ...". *Id.*, at 494, 501.

In a footnote, this Court addressed the defendant's argument that collateral estoppel bars prosecution on the remaining charges. This Court stated that "...the taking of a guilty plea is not the same as an adjudication on the merits after full trial, such as took place in *Ashe v. Swenson*." *Id.*, at 500 n.9.

The case at bar is easily distinguishable from *Ohio v. Johnson* in that because like in *Ashe*, there was an adjudication on the merits: the jury's verdict of acquittal on the charge of murder represents a final judgment which constitutes a valid determination of issues of ultimate fact. Just because the jury failed to reach a verdict on the conspiracy count does not make the validity of the determination of acquittal on the murder count questionable. Rather, based upon the final judgment of the acquittal, to permit a second jury to reconsider the very issue of ultimate fact upon which the Respondent prevailed implicates fundamental constitutional concerns of fair play.

In *dicta*, this Court stated: "Moreover, in a case such as this, where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Id.*, at 500 n.9. The Petitioner argued that this indicates that *Ashe* was never intended to apply to

cases where the state tried both counts simultaneously and the jury acquitted on one count and hung on the other.

However, such an interpretation ignores the rationale of collateral estoppel which is that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. While *Ashe* made reference to "any future lawsuit," it did not limit its holding to successive prosecutions. Instead, in order to effectuate the purpose of collateral estoppel, the analysis should focus on whether an issue of ultimate fact has been determined by a valid and final judgment from a prior proceeding regardless of whether or not the present proceeding is a successive prosecution.[6]

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[6] The overwhelming majority of the case law supports the application of the doctrine of collateral estoppel to the situation where a defendant is acquitted on one count and the jury failed to reach a verdict on another count. *See, e.g., United States v. Citron*, 853 F.2d 1055, 1059 (2d Cir. 1988); *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979); *United States v. Frazier*, 880 F.2d 878 (6th Cir. 1989), *cert. denied sub nom. DeBusk v. United States*, 493 U.S. 1083 (1990); *United States v. Gornto*, 792 F.2d 1028, 1034-36 (11th Cir. 1986); *Green v. United States*, 426 F.2d 661 (D.C. Cir. 1970) (per curiam); *United States v. Davis*, 369 F.2d 775 (4th Cir. 1966); *United States v. Kenny*, 236 F.2d 128 (3rd Cir. 1956); *United States v. Hans*, 548 F. Supp. 1119, 1124-6 (S.D. Ohio 1982); *United States v. Flowers*, 255 F. Supp. 485 (E.D.N.C. 1966); *Commonwealth v. Harris*, 582 A.2d 1319, 1321-2 (Pa. Super. 1990).

Finally, the Petitioner claimed that collateral estoppel should have no effect because the acquittal-deadlock situation is analogous to inconsistent verdicts wherein this Court has held that collateral estoppel has no application to the inconsistent verdict situation. *See* Petitioner's Petition at 24. Certainly, inconsistent verdicts are tolerated, *see, e.g., United States v. Powell*, 469 U.S. 57 (1984); *Dunn v. United States*, 284 U.S. 390 (1932), but "it hardly follows from the fact that a single jury in one trial is allowed to render inconsistent verdicts that a *second* jury in a *second* trial should be permitted to rely on the evidence rejected by the first." *United States v. Mespoulede*, 597 F.2d 329, 336 (2d Cir. 1979). In *Mespoulede*, the Second Circuit further explained:

> We tolerate inconsistencies in unified jury verdicts in criminal cases, not because of any singular virtue we attribute to inconsistency, but rather out of deference to the nature of the jury and the role it plays in our jurisprudence. There is no question but that a jury in a criminal trial has the power to render a verdict of acquittal that is wholly at odds with the law and the facts. . . . We recognize that the jury is in a sense the conscience of the community and can, for example, render a verdict to mitigate an overly severe punishment. . . . Similarly, in compromising in order to reach a unanimous verdict, a jury is often fulfilling its role as a cross-section of the community that it supposed to represent. Occasional anomalies are the price of unanimity. . . .
>
> Internal inconsistency, then, is not an end in itself, and it would be irrational to expand gratuitously the

> judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach contradictory results. Allowing a second jury to reconsider the very issue upon which the defendant has prevailed serves no valuable function. To the contrary, it implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the same ordeal of multiple trials, that lie at the heart of the double jeopardy clause.

Id., at 336-7; *see also State v. Aparo,* 223 Conn. at 392 (Pet. App. A-36).

Furthermore, application of collateral estoppel to the mistried count at a retrial is reconcilable with the rule that inconsistent verdicts are permissible since there is no inconsistence between an acquittal on one count and no verdict on another count having a common issue of ultimate fact. A mistrial is equivalent to no trial at all; it is not a final determination and decides no question of fact. Therefore, a jury's failure to agree, which results in a mistrial, does not establish any facts, and thus cannot establish facts inconsistent with those established by its verdict of acquittal.

Accordingly, since the Petitioner has failed to raise a substantial federal claim worthy of this Court's review and because the Court Of Appeals For The Second Circuit properly affirmed the district court's application of the principle of collateral estoppel to the case at bar in accordance with the principle enunciated in *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court should deny the Petition.

C. The Summary Order Of The Court Of Appeals For The Second Circuit Affirming The District Court's Granting Of The Writ Of Habeas Corpus On The Ground That Collateral Estoppel Precludes A Retrial On The Conspiracy Count Because The Jury Necessarily Concluded That The Respondent Did Not Have The Specific Intent That Her Mother Be Murdered Is In Accordance With The Principles Enunciated In *Ashe v. Swenson*, 397 U.S. 436 (1970).

The Respondent's assertion that the federal courts in this case overstepped their role as a habeas court is without merit. *See* Petition at 26-28. The district court properly recited and applied the principle of collateral estoppel, including the United States Supreme Court's mandate in *Ashe* that the rule of "[c]ollateral estoppel ... is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *See Aparo v. Superior Court*, 956 F. Supp. 118, 121 (D. Conn. 1996) (Pet. App. A-9) (quoting *Ashe v. Swenson*, 397 U.S. at 444). The district court properly focused its analysis on a review of the evidence of the first trial and the state trial court's jury charge in accordance with the United States Supreme Court's holding that a collateral estoppel analysis "requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444.

After a lengthy and in-depth analysis of the evidence and the jury charge, the district court held that the jury could not have acquitted the Respondent on the charge of accessory to commit murder, yet still, rationally and reasonably, have found that the she possessed the specific intent that her mother be murdered. The district court agreed with the Respondent's argument that the jury necessarily found she lacked the intent to kill because she admitted that she engaged in acts which were introduced as evidence to satisfy the actus reus element of the offense; namely, the fact that the Respondent supplied Coleman with the critical information that her mother was home alone at the condominium in Glastonbury and that her mother was asleep was introduced as evidence on the element of whether the Respondent aided Coleman in the murder of her mother.[7]

The district court properly rejected the Connecticut Supreme Court's analysis in this case since it applied collateral estoppel in a hypertechnical and archaic manner rather than with realism and rationality. The Connecticut Supreme Court rejected the Respondent's interpretation of the jury's verdict of acquittal and concluded that the jury could have found that there was a reasonable doubt that the Respondent had solicited, requested, commanded, importuned, or intentionally aided Coleman, and, at the

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[7] While the parties disputed the Respondent's state of mind, it was not disputed that she supplied Coleman with the information that was critical to the commission of the murder: that her mother was home alone at the condominium in Glastonbury and that she was asleep. She admitted to acts which if the jury had found she did with the intent to murder, it rationally would have convicted her of murder based upon a realistic review of the evidence of this case.

same time, have found that from July 14, 1987 until August 5, 1987, she had the intent to murder. *See Aparo*, 223 Conn. at 404. This analysis ignored the fact that the Respondent admitted she supplied Coleman with information that was critical to the commission of the murder. This fact was not in dispute. What was in dispute was whether she imparted the information with the intent to murder her mother. By its acquittal, as argued *supra*, the jury necessarily found that she lacked the intent to murder when she imparted this information.

It is unreasonable to believe, as asserted by the Connecticut Supreme Court, that the jury discredited Coleman's testimony about the Respondent's conduct during that time period -- in other words, that she never begged him to kill her mother prior to her trip to Binghamton, that she never called him up and berated him for not following through, and that during the August 4th phone calls, she never requested him to murder her mother that night -- and at the same time for the jury to have believed that she possessed the intent to murder her mother during the July 14, 1987 though August 5, 1987 time period. Logically, if the jury had believed that she possessed the intent to murder her mother when she told Coleman that her mother was home and going to bed, then the jury would have convicted her of murder as an accessory.

In rejecting the Respondent's argument, the Connecticut Supreme Court also reasoned that: "Although the defendant concededly told Coleman that her mother was home on the night of the murder, the jury could reasonably have found, on the basis of either Coleman's or the defendant's testimony, that although she may have wanted to kill her

mother, she did not make this statement with the intention that it result in her mother's death." *Aparo*, 223 Conn. at 403. This reasoning defies the principles of collateral estoppel analysis and is inapposite to the United States Supreme Court's edict that "[t]he inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ashe*, 397 U.S. at 444. In other words, based upon the Connecticut Supreme Court's analysis, the Petitioner had the intent on some days during the July 14, 1987 through August 5, 1987 time period, but did not have the intent when she imparted information which was critical to the commission of the murder. The state Supreme Court's analysis is hypertechnical and illogical.

Therefore, the district court's analysis properly viewed the entire record with realism and rationality and found that the jury necessarily determined that when the Respondent informed Coleman of her mother's whereabouts and activities on the night of the murder, she lacked the specific intent to commit murder, an element that the state will have to prove at the retrial. Accordingly, the district court's ruling granting the Petition for Writ of Habeas Corpus is in accordance with the principles of collateral estoppel as enunciated by this Court in *Ashe v. Swenson*, and therefore, the Petition should be denied.

D. As An Alternative Ground, The District Court's Granting Of The Writ Of Habeas Corpus On The Ground That Collateral Estoppel Precludes A Retrial On The Conspiracy Count Because The Jury Necessarily Concluded That The Respondent Did Not Agree That Her Mother Be Murdered Is In Accordance With The Principles Enunciated In Ashe v. Swenson, 397 U.S. 436 (1970).

In its Summary Order, the Court of Appeals for the Second Circuit affirmed "for substantially the reasons stated by Judge Daly in Section I.A. of his opinion." *See* Pet. App. A-2. Therefore, if the Petition were granted, the Respondent urges this Court to affirm the district court's decision in its entirety. The district court also correctly concluded that the trial court's jury charge collapsed the distinction between accessory to commit murder and conspiracy to commit murder and that based upon the trial court's instructions as a whole, the jury necessarily found that the Respondent did not intend to join in an agreement with Coleman to commit murder.

At a retrial on the conspiracy charge, the state will have to prove that there was an agreement between the Respondent and Coleman to murder her mother. *See State v. Grullon*, 212 Conn. 195, 199-203, 562 A.2d 481 (1989). Normally, the charge of murder as an accessory does not require the state to prove an agreement between the accessory and the principal. *State v. Johns*, 184 Conn. 369, 439 A.2d 1049, 1054 (1981). In the case at hand, however, the trial court added the element of agreement to the accessory count in its charge to the jury. The court instructed the jury that there were three essential elements

that the state had to prove beyond a reasonable doubt: (1) that between July 14, 1987 and August 5, 1987, the Petitioner intended to cause the death of her mother; (2) with that intent, she solicited, requested, importuned or intentionally aided Coleman to cause her mother's death between July 14, 1987 and August 5, 1987; and, (3) acting with these intentions, she intended to aid, assist or join Coleman in the commission of the murder of her mother. See Respondent's Appendix, 6A.

Thus, although the trial court did not use the word agree, its instruction on the accessory count amounted to a conspiracy charge when it instructed the jury that it could convict if it found that the Petitioner intended to join with Coleman. As charged, there is no substantive difference between the accessory charge and the conspiracy charge in that both require that between July 14, 1987 and August 5, 1987, the Petitioner possessed the specific intent to murder; that between July 14, 1987 and August 5, 1987, the Petitioner intended to join (agree) with Coleman to murder her mother; and finally, that the commission of the murder take place.

Therefore, under the theory that the acquittal was due to the fact that the Petitioner possessed the intent to murder but that she did not do any of the alleged acts, including that she did not "intend to join" Coleman in the commission of murder, then she also did not intend to agree with Coleman.[8]

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[8] The Connecticut Supreme Court also rejected this claim, stating that the jury instruction "clearly separate[d] the question of the Petitioner's intent to join Coleman from that of whether she solicited, requested, commanded, importuned, or intentionally aided

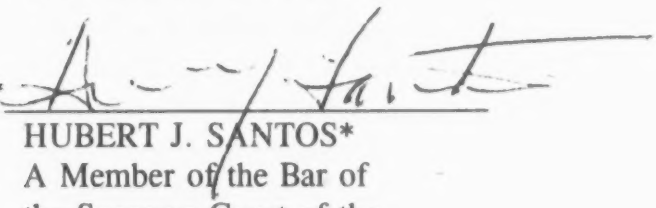
Since the state will have to prove that the Respondent intended to agree to murder Joyce Aparo in the retrial, and since that element has already been determined in her favor, collateral estoppel bars a retrial. Accordingly, the district court's ruling granting the Petition for Writ of Habeas Corpus is not in conflict with any decisions of this Court. Rather, the district court applied collateral estoppel to the case at bar in accordance with this Court's decision in *Ashe v. Swenson*, and therefore, the Petition should be denied.

Coleman to commit murder. The jury was not told that its resolution of the former question would answer the latter as well." *Aparo*, 223 Conn. at 402 n.6. However, realistically, under the trial court's charge, there is no distinction between the second and third elements charged: element two required the state to prove that the Petitioner "intentionally aid" and element three required the state to prove that she "intended to aid, assist or join." Thus, viewing the charge in a rational and realistic manner in accordance with *Ashe v. Swenson*, 397 U.S. 446 (1970), there were two elements that the jury had to find beyond a reasonable doubt: (1) that between July 14, 1987 and August 5, 1987, the cross-petitioner intended to cause the death of her mother; (2) with that intent, she solicited, requested, importuned or intentionally aided, assisted or joined Dennis Coleman to cause her mother's death between July 14, 1987 and August 5, 1987. Accordingly, the Connecticut Supreme Court's rejection of the Respondent's argument is without merit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be denied in that the petitioner has failed to raise a substantial federal claim worthy of this Court's review since the principle of collateral estoppel was properly applied to the case at bar in accordance with established law.

THE RESPONDENT

BY 

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No. 97-424

In The

Supreme Court Of The United States

October Term, 1997

SUPERIOR COURT, JUDICIAL DISTRICT
OF HARTFORD / NEW BRITAIN AT HARTFORD,

Petitioner,

v.

KARIN APARO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

TABLE OF CONTENTS TO APPENDIX

Information 2A

Transcript of Jury Charge
Regarding Conspiracy Charge
From Transcript Dated
June 18, 1990 . . . . . 3A

Transcript of Jury Charge
Regarding The Subsections
Of The Conspiracy Charge
From Transcript Dated
June 27, 1990 . . . . . 4A

Transcript of Jury Charge
Regarding Elements Of
The Accessory Charge From
Transcript Dated
June 18, 1990 . . . . . 5A

Transcript of Jury Charge
Regarding Elements Of
The Conspiracy Charge From
Transcript Dated
June 18, 1990 . . . . . 6A

No. 53529	: SUPERIOR COURT
STATE OF CONNECTICUT	: HARTFORD/NEW BRITAIN JUDICIAL DISTRICT at HARTFORD
v.	
KARIN E. APARO	: SEPTEMBER 29, 1987

INFORMATION

COUNT ONE

James E. Thomas, Assistant State's Attorney for the Judicial District of Hartford/New Britain accuses Karin E. Aparo of Glastonbury of the crime of MURDER, in violation of Connecticut General Statutes Sections 53a-54a(a) and 53a-8, and charges that at or near the town of Glastonbury, Connecticut on divers dates between July 14, 1987 and August 5, 1987 with the intent to cause the death of Joyce Aparo the defendant solicited, requested, importuned and intentionally aided Dennis Coleman to intentionally cause the death of Joyce Aparo on or about August 5, 1987 at approximately 1:56 A.M. at or near 3 Butternut Drive, Glastonbury, Connecticut.

COUNT TWO

And the said Attorney further accuses said defendant of the crime of CONSPIRACY TO COMMIT MURDER, in violation of Connecticut General Statutes Sections 53a-48 and 53a-54a(a), and charges that:

a) at or near the town of Glastonbury, Connecticut on divers dates between August 1986 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY; and

b) at or near the town of Glastonbury, Connecticut on divers dates between July 14, 1987 and August 5, 1987 with intent that conduct constituting the crime of MURDER be performed, the defendant agreed with Dennis Coleman to cause the MURDER of Joyce Aparo and on August 5, 1987, Dennis Coleman caused the death of Joyce Aparo in furtherance of said CONSPIRACY.

Transcript of Jury Charge, June 18, 1990
Beginning at page 38.

... I've just given you one instruction on the two parts of the count of conspiracy. However, it applies to both parts, so you must consider both each part separately and make a finding as to each part separately.

Beginning at page 40.
As to the second count, each part will be read separately, so the clerk will read part (a), and then ask how did the jury find the defendant, guilty or not guilty . . . and then the second part will be read, and, likewise, the foreperson will be asked.

Transcript of Jury Charge, June 27, 1990
Beginning at page 95.

THE COURT: Ladies and gentlemen, I have received your communication, "You Honor, the jury would like to rehear your Honor's instructions regarding the distinction between count two conspiracy charges (a) and (b), including examples provided by the court to illustrate this distinction." I don't recall that I gave you any examples to indicate a distinction, and in answer to your question, the distinction is only one of semantics, because if you were to find the elements of either (a) or ((b), you would necessarily find all of the elements of the other. With that, I will ask you to resume your deliberations.

Transcript of Jury Charge, June 18, 1990
Beginning at page 30.

There are three elements the State must prove beyond a reasonable doubt in order to warrant a conviction: First, the defendant intended to cause the death of her mother; second, with the intent to cause her mother's death, she solicited, requested, commanded, importuned or intentionally aided Dennis Coleman to cause her mother's death; and, third, acting with these intentions, she intended to aid, assist or join Dennis Coleman in the commission of the murder of her mother.

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There are three elements the State must prove beyond a reasonable doubt in order to warrant a conviction: First, the defendant intended to cause the death of her mother; second, with the intent to cause her mother's death, she solicited, requested, commanded, importuned or intentionally aided Dennis Coleman to cause her mother's death; and, third, acting with these intentions, she intended to aid, assist or join Dennis Coleman in the commission of the murder of her mother.

As to the first element, I have already defined intent. So as to the first element, that the defendant intended to cause the death of her mother, you may consider the nature of the -- the nature of the evidence to consider here would be the testimony of Dennis Coleman and the testimony of the defendant, and, of course, you recall the testimony of Dennis Coleman that there was a begging of him to cause the death of the defendant's mother, and the defendant's testimony concerning her denial of it.

Now, also, you may consider the various interpretations of the letters that have been put into evidence. Likewise, you may consider Dennis Coleman and the defendant's testimony concerning the nature of the subject matter during the various telephone calls. You may also consider in this connection the testimony of Shannon Dubois as to the conversation she had with the defendant and with Dennis Coleman on August 6,

1987. You may consider the admission of the defendant to Jill Smith, which she testified occurred in February of 1988, and the testimony of Dr. Cegalis and Dr. Borden in explanation of the conduct of the defendant through the period from the summer of 1986 through and after the death of her mother on August 5th.

As to the second element, you'll note that the words are in alternative, so the State does not have to prove each of them, because one would be sufficient to determine the element, and that is, with the intent to cause her mother's death, did she solicit, request, command, importune or intentionally aid Dennis Coleman to cause her mother's death. So, as I say, those are the alternative. Any one particular act would be sufficient, if you found it beyond a reasonable doubt, to find that element.

Besides the evidence you would be considering for the first element, you would consider for the second as well -- you should consider the testimony of Dennis Coleman that on Thursday before the defendant's trip to Rowayton, and then onto Binghamton, that at her window, crying, she begged him to kill her mother so she wouldn't have to go; that on August 4th, in a phone conversation, she said her mother would be coming home alone, and that she did not come home because she did not want to be present when the act of killing occurred, but would be -- would be by in the morning to clean up, and that after a call from her mother that she was tired and was going to bed, she called Dennis back and told him she -- her mother was tired and going to bed; and

the defendant's testimony that she lied to Dennis about not wanting to go to Binghamton, and that she was looking forward to it, and her relationship with her mother had improved, and she denied asking him to kill her mother.

As to the third element, acting with the above intention, did she aid, assist or join in the commission of the murder of her mother, as to this element, the testimony of Dennis Coleman that he intentionally caused the death of Joyce Aparo, along with the evidence you considered as to the first and second element.

If you find that the State has proved each of these elements to you beyond a reasonable doubt, then you have found the defendant guilty of the first count of accessory to murder. And, again, the elements are: First, that the defendant intended to cause the death of her mother; second, with the intent to cause her mother's death, she solicited, requested, commanded, importuned or intentionally aided Dennis Coleman to cause her mother's death; and, third, acting with these intentions, she intended to aid, assist or join Dennis Coleman in the commission of the murder of her mother. On the other hand, if you find that the State has failed to prove any one of these elements to you beyond a reasonable doubt, you must find the defendant not guilty.